NO. 6439

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PETER SEKINOFF,

Appellant,

vs.

N. P. SEVERIN COMPANY, a partnership of which N. P. SEVERIN and A. N. SEVERIN are members,

Appellees.

Appellant's Brief

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STATEMENT OF FACTS

This action was brought by the appellant, plaintiff in the lower court, under the workmen's compensation act of Alaska. In the complaint he alleges, as far as material, that on or about the 14th day of January, 1930, in the course of his employment, he accidentally received a personal injury while shoveling dirt; in that he was hit with some foreign substance in his left eye, by which he was permanently injured, which injury has resulted in the total loss of the sight of his left eye; and that by reason of the loss of his left eye, his right eye was irritated and strained; and that by reason of said injury, the plaintiff's earning capacity has been reduced to the extent of fifty per cent; that

he is single, without dependents, and prays for damages (Record, pages 2 and 3). The answer admits the employment and that the plaintiff was single, without dependents, but denies the injury (Record, page 5).

Upon the trial, evidence was adduced showing that while the appellant was working for the appellee, on or about the 14th day of January, 1930, while he was working with pick and shovel, something hit him in his left eye; that the shifter, Carney by name, was behind him and helped him clean the dirt out of his eye (Record, page 8); that about two days later, the same shifter took him to the superintendent's office, and then they sent him to the company's doctor, Dr. Pigg (Record, pages 8, 10 and 12).

That before this time he had worked as a laborer and miner and had never had any trouble with his left eye (Record, pages 8, 9, and 12) and had fairly good vision (Record, page 9), but had had some trouble with his right eye (Record, page 9); that he continued treatment with Dr. Pigg for some two (2) months until he was discharged by Dr. Pigg (Record, pages 10, 11 and 37), at which time he was given a prescription, told to get it filled, and to apply the medicine to his eye himself and then he would be all right (Record, pages 10, 11 and 37).

That on the same day that he was discharged by Dr. Pigg, he was examined by Dr. Council, who told him that an operation on his eye was necessary and that it would cost him $250.00 (Record, page 11). That on or about the same time, he was examined by Dr. Dawes,

who gave him a note, with instructions to take the note to the appellee (Record, pages 11 and 13); which note stated that his eye needed attention (Record, pages 13 and 14). That he took the note to the appellee's bookkeeper but received no satisfaction from him except saying that he did not care for that (Record, page 11).

That the injury to the plaintiff's left eye is a traumatic cataract, which has resulted in the total loss of sight in that eye (Record, pages 9, 13 and 24). That the appellant also has a cataract on his right eye, which was about three (3) years old at the time of the trial (Record, page 36).

That plaintiff, since receiving that injury again applied for work with the defendant company but was told that they had no work for him (Record, page 9); and had also been employed in the saw mill in Ketchikan, but that he was unable to hold his job. That plaintiff's right eye was very tired then (Record, page 9).

Evidence was introduced that the cataract on the appellant's eye could be removed by a surgical operation (Record, page 25), and if the operation was successfully performed, the appellant, with the use of glasses, would have considerable vision in his left eye (Record, page 18); that after the operation he would not be able to see without glasses, and that with glasses, the injured eye would not co-ordinate with the other in that it would not accommodate itself as to distance (Record, pages 18, 28), that the operation of removing a cataract

is comparatively simple but is a delicate operation and there is very little to fear (Record, page 25); that lots of times you are unable to bring the operated eye up to normal and they do not act the same and it creates a certain amount of blurring (Record, page 18).

Thereupon, the defendant moved for a directed verdict on the following grounds: First, that there was no evidence of any decrease of earning capacity; and second, that there was no evidence that plaintiff suffered the total loss of his left eye (Record, page 41). Which motion was granted and the jury instructed to return a verdict for the defendant (Record, page 41).

LAWS OF THE TERRITORY OF ALASKA

Chapter 25, Laws of 1929, "The Workmen's Compensation Act of Alaska."

Section 1 (paragraph near bottom of page 49).

> "Where any such employee receiving an injury arising out of, and in the course of his or her employment, as the result of which he or she is totally and permanently disabled, he or she shall be entitled to receive compensation as follows:"

(e) (middle page 50)

> "In those cases where such employee so injured at the time of his injury was unmarried and had no children nor father nor mother dependent upon him, he shall receive the sum of Five Thousand Four Hundred Dollars ($5,400.00)"

Sec. 1. (near bottom of page 50)

> "Where any such employee receives an injury arising out of, or in the course of his or her employ-

ment, resulting in his or her partial disability, he or she shall be paid in accordance with the following schedule:"

Sec. 1. (middle page 52)

"For the loss of an Eye:"

(a) (middle page 52)

"In case the employee was at the time of the injury unmarried, $2.160.00."

Sec. 1. (paragraph middle of page 53)

"Whenever such employee receives an injury, arising out of and in the course of employment, as a result of which he or she is partially disabled, and the disability so received is such as to be permanent in character and such as not to come wholly within any of the specific cases for which provision is herein made, such employee shall be entitled to receive as compensation a sum which bears the same relation to the amount he or she would be entitled to receive hereunder if he or she were totally and permanently disabled that the loss of earning capacity of such employee, by reason of the accident, bears to the earning capacity such employee would have had had he or she not been injured, the amount to be paid in no case to exceed Seven Thousand Two Hundred Dollars ($7,200.00)."

Sec. 2.

"And in addition to the compensation for injured employees in this act otherwise provided, the employer shall furnish to and for each injured employee such reasonably necessary medical, surgical and hospital treatment, including necessary transportation to and from hospitals, as may be required by reason of the injury——"

ARGUMENT

The only error assigned is that the Court erred in instructing the jury to return a verdict in favor of the defendant.

The argument in this case resolves into two questions.

First: What was the evidence as to plaintiff's decreased earning capacity, and was that evidence sufficient to go to the jury? If this question is answered in the affirmative then the case should be reversed. If, however, the first question is answered in the negative then the second question must be considered, which question is: Was the evidence sufficient for the plaintiff to recover for the loss of his left eye?

The evidence relating to the first question is as follows:

(a) That before the injury the plaintiff worked as a laborer, and miner; that he had a cataract on his right eye about three (3) years old, at the time of the trial (Record, page 36), and had been treated for this by Dr. Pigg, but had never had any trouble with his left eye before the injury, in which eye he had fairly good vision (Record, pages 9, 10 13).

(b) That the plaintiff was injured arising out of and in the course of his employment while working for the defendant, by having some foreign substance hit his left eye (Record, pages 8 and 10); That said

injury resulted in the total loss of sight in his left eye (Record, page 9).

(c) That the plaintiff was refused any further employment by the defendant after the injury (Record page 9).

(d) That the plaintiff worked in a sawmill in Ketchikan after the injury, for a short time, but was unable to hold his job; that his right eye was very tired then (Record, page 9).

We contend that the foregoing was evidence of decreased earning capacity and should have been submitted to the jury to determine the decreased earning capacity of the plaintiff; and that it was error for the Court to take the case from the jury. And further contend that if the jury had found a percentage of decreased earning capacity, the foregoing evidence would be sufficient to sustain a verdict for at least fifty per cent decreased earning capacity.

Consolidated Lead and Zinc Co. vs. State Industrial Insurance Commission, 295 Pac. 210.

In this case, the commission allowed fifty per cent disability. This ruling was questioned in the case on appeal and the Court reviewed the evidence relating to the disability. The case involved the use of a leg, and the doctor testified that he had the loss of use of the leg during that portion of the time the knee locked on him, and that he could not determine the per cent of disability, that that depended upon the pain and so forth. The doctor further said that the injured man might pro-

ceed for several months without any disability, and then if the knee locked he would be unable to use it for perhaps several months. The claimant testified to the pain suffered by him, and that the frequent disability depended upon the use to which he put his leg; that at times during the course of his work when it was necessary to walk on the leg for an extended period of time, he would suffer pain and the knee would swell and he would be forced to quit work until the knee was normal again. The law in the state required that if the injury complained of is of a character as to require skilled and professional men to determine the cause and extent thereof, the question is one of science and must necessarily be proven by the testimony of skilled professional persons. The Court held that the rule did not apply to the case at bar, and that the evidence was sufficient to sustain the finding awarding claimant compensation for fifty per cent loss of the use of his right leg.

In the case at bar the claimant had lost the sight of one eye and had a three-year-old cataract on the other; was refused any further work by the defendant; and could not hold the only job he had since had. In Alaska the recovery is a percentage of a lump sum, and not a percentage of wages previously earned, in this, the Alaska act differs from almost all other compensation acts.

Atlantic Oil Producing Co. vs. Houston, 298 Pac. 245.

In this case there was a total loss of one eye and a

doctor testified to a two per cent loss in the other eye, and the award was fifty-two per cent for five hundred weeks, which was sustained by the Court.

The next question is whether or not the plaintiff, under the evidence and law, could recover for the loss of his eye. Evidence relating to this question is, that the plaintiff in the course of his employment received an injury arising out of his employment, to his left eye. That said injury resulted in a traumatic cataract, which, at the time of the trial, had already covered his left eye and prevented him from having any useful vision in said eye (Record, pages 14 and 24). That the plaintiff had taken treatment from the doctor provided by the defendant company for two months, when he was discharged and told that he should wash his eye himself, and that then he would be all right (Record, pages 10 and 11). That he, on the same day, consulted another physician who told him that an operation was necessary, and that it would cost him $250.00. He, thereupon, consulted a third physician, who gave him a note, which he delivered to the defendant company, requesting the defendant company to give the eye attention, which note was disregarded by the defendant (Record pages 11 and 13).

The lower court based its decision on the ground that a cataract is operatable, and that plaintiff will probably have considerable use of the eye after the operation (Record, page 40) and that therefore the eye was not a total loss.

There is no specific provision of the workmen's compensation act of Alaska, authorizing or requiring an injured employee to submit to an operation. In this regard, the laws of Alaska are similar to Wisconsin and Oklahoma, under which it is held that the rule is that "where a workman unreasonably refuses to undergo a minor operation simple, safe and reasonably certain to effect a cure, the continuing disability results not from the injury, but from his own willful act," and that rule is based upon the theory that "the statutory obligation of the employer to pay compensation during the continuance of the disability is subject to the implied condition that the workman shall avail himself of such reasonable remedial measures as are within his power."

Moran vs. Oklahoma Engineering and Machine and Boiler Co., 214 Pac. 913.

Lesh vs. Illinois Steel Company, 175 N. W. 539; 163 Wis. 124.

This rule includes at least four requirements, first, there must be a refusal to undergo the operation; second, it must be a minor operation simple and safe; third, it must be reasonably certain to effect a cure; fourth, the refusal must be unreasonable.

There must be a refusal. And refusal implies a demand, and we contend that under the facts shown, there was no demand made by the defendant to treat or operate the plaintiff's eye, nor did the plaintiff ever refuse to have his eye treated or operated upon by defendant's physicians. The plaintiff submitted himself for

treatment, was treated by the defendant's physician and discharged and told he would be all right (Record, page 10) and thereafter, through Dr. Dawes, requested treatment from the defendant which the defendant refused to give (Record, page 11). We contend that such a demand and refusal was necessary and the burden to prove the same was on the defendant, and that it was the duty of the defendant to treat the plaintiff for injury received; Sec. 2, Workmen's Compensation Act of Alaska; and that the defendant cannot now take advantage of its own wrong and its refusal to perform a statutory obligation.

Gildersleeve et al. vs. Industrial Commission et al. 295 Pac. 1033

Holds that such a demand and refusal is necessary and that in the case under consideration the evidence does show that there was a recommendation of hospital treatment, by two physicians, who originally attended the employee, but that it was not satisfactorily established, that these recommendations were authorized tenders made on behalf of the insurance carriers or employer; and the Court therefore holds that there was no demand. This case had been previously appealed from an order made by the commission, the Court, on appeal, holding that from the record, it appeared that "no tender of medical or surgical treatment was ever made by either the employer or insurance carrier."

O'Neill vs. Industrial Accident Commission, 266 Pac. 866.

Kingsport Silk Mills vs. Cox, 33 S. W. 2nd 90; 161 Tenn. 470,

Holds that contention that operation would greatly reduce employer's liability cannot be sustained where physicians differ and employer made no legal demand for operation.

The case of Moran vs. Oklahoma Engineering Co. et al., supra, further holds that whether or not the employee has unreasonably refused to submit to an operation is a question of fact, and that the burden of proof was upon the employer to establish all facts as to whether or not refusal to submit to operation and treatment was unreasonable, and they must have established further that the treatment would have relieved the trouble.

Consolidated Lead & Zinc Co. vs. The State Industrial et al., 295 Pac. 210.

In this case the rule stated in the case of Moran vs. Oklahoma Engineering Co. et al., was approved but expressly limited to minor operations, simple, safe and reasonably certain to effect a cure, and approved the rule laid down in Henry vs. Oklahoma Union Railway Co., 197 Pac. 488; 81 Oklahoma 244; holding that the "Industrial Commission has no authority to compel an employe to submit to a major operation where there is a risk of life involved in the slightest degree"; and further cites from the case as follows: "The rule appears to be supported by the overwhelming weight of authority that no man shall be compelled to take a risk of death, however slight, in order that the pecuniary obligations created by law in his favor against his em-

ployer may be minimized," and quotes the rule stated in McNamara vs. Metropolitan State Railway Co., 114 S. W. 50; 133 Mo., app. 645, in which it is said, "We do not think plaintiff should be criticized and punished on account of his failure to undergo a surgical operation. He should be accorded the right to choose between suffering from the disease all his life, or taking the risk of an unsuccessful outcome of a surgical operation. Certainly defendant whose negligence brought the unfortunate condition is in no position to compel plaintiff to again risk his life in order that the damages may be lessened. To give heed to such contention would be to carry to an absurd extreme the rule which requires a person damaged by the wrong of another, to do all that reasonably may be done to mitigate his damages." The Court then considers what is dangerous or serious as compared with a minor, simple and safe operation, and holds that the testimony was that it was highly probable that an operation on the claimant's knee would eventually give claimant one hundred per cent function of the use of said knee, but the doctor who gave the evidence did not go so far as to state that the claimant would get one hundred per cent result, or one hundred per cent function of the knee. The Court further holds that as to whether or not the claimant unreasonably refused to be operated on, is a question of fact, and that the burden of proof was upon the employer. That the employer had failed to sustain this burden by proof that the operation would be "simple, safe and reasonably certain to effect a cure."

Graf vs. National Steel Products Co., 38 S. W. 2nd, 518,

Holds that compensation for injury to the eye was properly based on actual loss of visual efficiency rather than loss of vision when corrected with corrective lenses.

Globe Cotton Oil Mills vs. Industrial Accident Commission, 221 Pac. 658.

Holds that where an injury to a workman necessitated the removal of the lens of an eye in which condition he had but one hundredth vision, having previously lost the sight of his remaining eye, although, with the use of glasses his vision was restored to practically normal, it was not error to allow him nineteen and one-fourth permanent disability.

Juergens Bros. Co. vs. Industrial Commission, 125 N. E. 337,

Holds that where the injury necessitated the removal of the lens of an eye, leaving it so that it could not be used because it would not co-oordinate with the normal eye, although by the use of various lenses the servant might have some use of the injured eye, and in case of loss of the other eye it would be of benefit to him, he must be deemed to have suffered a total loss of one eye.

Stefan vs. Red Star Mill & Elevator Co., 187 Pac. 861

Holds that where an injury to an eye is such that it distorts the angle of vision thereof, but does not destroy the vision, so that the use of both eyes caused a double vision and in order to see, it was necessary that the in-

jured eye be kept covered, the employee suffered permanent loss of the use of an eye.

Butch vs. Shaver, 184 N. W. 572,
Holds that where an employee has the sight of her eye irrecoverably destroyed, though with extra artificial means she may have fair vision, she is entitled to compensation as for the loss of an eye.

Johannsen vs. Union Iron Works, 117 A. 639,
Holds that an employee suffering an injury to his eye, causing permanent impairment of the vision, is entitled to compensation although the vision can be rendered normal by the use of glasses.

Winona Oil Company vs. Smithson, 209 Pac 398,
Holds that under the law where the injured employee lost all practical use of an eye, he was entitled to compensation irrespective of his ability to continue to perform the work in which he was engaged at the time of the injury.

Maryland Refining Company vs. Colbaugh, 238 Pac. 831,
Holds that under the law relating to compensation for loss of an eye the State Industrial Commission is not required to take into consideration that effect of permanent injury to eye might be minimized by artificial means.

Alessandro Petrillo Co. vs. Marioni, 131 At. 164,
Holds that loss of vision in an eye must be determined without the use of lenses, and cites many cases in support of the rule.

Traveler's Insurance Co. vs. Richmond, 284 S. W. 698,

Holds that if there is a total loss of vision without the use of lenses, even if by the use of lenses there was considerable vision it is a total loss of sight in an eye. This case was reversed, 291 S. W. 1085, on the ground that there was not a total loss of vision without glasses.

Suggs vs. Ternstedt Manufacturing Co., 206 N. W. 490.

This was an appeal from an order of the Department of Labor and Industry. In this case the eye had been injured by a piece of steel and a traumatic cataract had formed. It had been removed by an operation, the expense of which, was borne by the defendant. Since the operation, the plaintiff had one-sixtieth normal vision without the use of glasses, but with a strong lens, his vision with the operated eye was above normal, but his two eyes did not co-ordinate. The Commission held that he was entitled to a statutory compensation for the loss of an eye. The Court holds that the exact question is new to the Court, but that the question has been decided in other courts. In the New York case of Frings vs. Pierce Arrow Motor Car Co., 182 App. Div. 445, which case was very much like the case thereunder consideration, it was held that since the workman, with the aid of proper glasses, had at least normal vision, although such eye did not co-ordinate with the injured eye he had not lost an eye or the use of an eye, two justices dissenting. That the same division in the case of Smith vs. F. & B. Construction Co., 185 App Div.

51, where the injured workman with the use of a glass had but one-third vision with the injured eye, the award was sustained for the loss of an eye and the Court held that the rule laid down in the Frings case should not be extended beyond the facts there found.

The Court then cites the following with approval from the case of Juergens Bros. Co. vs. Industrial Commission Co., supra, as follows:

> "Plaintiff in error contends that, should Kaage lose the sight of his good eye, he could by the use of lenses gain the use of the injured eye, and therefore he has not lost the sight of the injured member. The question before this Court is whether or not this man has for all practical uses and purposes lost his eye. The application of laws of this character should not be made to depend upon fine-spun theories based upon scientific technicalities, but such laws should be given a practical construction and application. For all practical purposes, when a person has lost the sight of an eye, he has lost the eye, and to say that the statute providing compensation for the loss of the sight of an eye does not apply here because of the remote possibility of Kaage losing his good eye, whereby he can, through artificial means, gain a certain amount of use of the injured member, is to place a construction on a remedial act which deprives it of all practical effect. Such could not have been the intention of the Legislature in passing this act."

and holds that the Illinois case, above cited, is in accord with the weight of authority, and that the weight of authority sustains the finding of the commission.

In considering the effect of the foregoing cases it must be borne in mind that the Alaska statute ex-

pressly imposes upon the employer the duty to furnish medical treatment; that after the appellant had been discharged by the appellee's physician, Dr. Pigg, the appellant consulted a physician, Dr. Dawes, who in a note to the appellee asked that the eye be given further treatment; that the suggestion contained in the note was ignored by appellee and appellant was given no further medical or surgical treatment, although the statute expressly imposes upon the employer the duty to furnish such treatment. The appellee not only did not demand of the appellant that he be permitted to operate on his eye, but when asked to treat the eye, it refused and neglected to do so. The appellant did all he could do; the appellee simply failed to do its statutory duty. To hold that the appellant cannot recover because the eye could have been operated on and wasn't, is to allow the appellee to take advantage of its own wrong and neglect of statutory duty. Whatever else the law may permit, it does not permit this.

Under the facts in this case the operation, if any was performed, would have to be for the removal of the lens. This lens if removed would have to be replaced with an artificial lens, which artificial lens would not have the power of accommodation, and for this reason the eye with the artificial lens would not co-ordinate with the other eye. This being so, and the rule of law as laid down in the foregoing cases being that under such conditions the plaintiff would be entitled to recover for the loss of an eye, it is immaterial whether or not an operation has been performed, the testimony being that

while the operation is comparatively simple, it is a delicate operation; that the result of the operation at best would be to restore partial vision with the use of glasses, which eye with the use of glasses would not co-ordinate with the natural eye and would blur, and would have no useful vision without glasses.

Surely under such testimony it can not be said that the operation was reasonably certain to effect a cure, or that the refusal of the plaintiff, even if an operation was demanded by the defendant, would be unreasonable. We, however, contend that the defendant did not request or demand that the plaintiff be operated upon or treated; that the plaintiff in effect requested such treatment, which treatment was tacitly refused plaintiff by the defendant; that under the law, the defendant was required to furnish such treatment; and that the defendant can not take advantage of its own wrong. We think the Appellate Court should reverse this cause and send it back to the District Court for re-trial.

Respectfully submitted on this brief without oral argument.

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